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No. 09-196

SUPREME COURT, U.S.
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IN THE
Supreme Court of the United States

JOSEPH P. WARD,

Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT 1

ARGUMENT 2

CONCLUSION 10

knew the Local was interested in purchasing and later selling that property at a large personal profit. Pet. App. 2a-3a. The District Court (Castillo, D.J.) dismissed Local 150's complaint on the ground that "Section 501 does not support a private cause of action for unions." Pet. App. 32a. The Seventh Circuit (Kanne, C.J., joined by Williams and Sykes, C.J.) reversed, concluding that "§ 501 of the Act [does] create[] a private cause of action for labor organizations to sue in federal court for alleged violations of the duties it establishes." Pet. App. 4a.

ARGUMENT

The question presented by the petition for certiorari is whether § 501 of the Labor Management Reporting and Disclosure Act of 1959 – one of the "Safeguards for Labor Organizations" set forth in Title V of the Act, 29 U.S.C. Subchapter VI – creates a cause of action for a labor organization to bring suit in its own name seeking recovery for the "liability for breach of the duties declared by th[at] section." 29 U.S.C. § 501(a).

The Seventh Circuit below, "agree[ing] with the Eleventh Circuit," concluded that "the text and remedial structure of § 501(a) and (b), read together," do create "a federal remedy for labor organizations against union officers who violate their statutory duties." Pet. App. 25a, citing *Int'l Union of Elec., Elec., Salaried, Mach. & Furniture Workers v. Statham*, 97 F.3d 1416, 1420-21 (11th Cir. 1996).

The conclusion reached by the Seventh and Eleventh Circuits that § 501 does create a federal labor organization cause of action follows directly from the statutory text. Section 501(a) declares that "[t]he officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a

group." 29 U.S.C. § 501(a). Section 501(a) goes on to define in detail "the duty of each such person, taking into account the special problems and functions of a labor organization" and to provide that the labor organization may not "relieve any such person of liability for breach of the duties declared by this section." *Ibid.* Moreover, § 501(b) adds that where a "labor organization or its governing board or officers refuse or fail to sue" an officer who "is alleged to have violated the duties declared in subsection (a)," a "member may sue such officer . . . to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization." 29 U.S.C. § 501(b).

A. The certiorari petition's principal claim is that the Seventh Circuit decision below and the Eleventh Circuit *Statham* decision are "in direct conflict with the Ninth Circuit [decision in] *Bldg. Material and Dump Truck Drivers, Local 420 v. Traweek*, 867 F.2d 500, 506-507 (1989)" and that this Court's review is necessary to resolve that conflict. Pet. 10. That claim does not bear scrutiny.

A district court within the Ninth Circuit very recently concluded that it was free to "adopt[] the reasoning of the Seventh Circuit and Eleventh Circuit in holding that Section 501(a) implies a federal right of action in favor of labor unions to enforce the duties established therein." *Service Employees Int'l Union v. Roselli*, 2009 WL 1382259, p. *2 (N.D. Cal. May 14, 2009). That court explained why, contrary to the Petitioner, the Ninth Circuit's *Traweek* decision is *not* "in direct conflict with" the Seventh and Eleventh Circuit decisions so as to preclude adoption of their reading of § 501 as providing for a labor organization cause of action:

> "In holding that Section 501(b) is limited to suits by union members and that unions them-

selves cannot sue under Section 501(b), *Building Materials and Dump Truck Drivers, Local 420 v. Traweek*, 867 F.2d 500, 506-507 (9th Cir. 1989), did not consider whether Section 501(a) implies a right of action by unions. The actual holding of *Traweek* expressly pertained only to Section 501(b) and *not* to Section 501(a). *Id.* at 507 (col. one)." *Ibid.* (emphasis in original).

It is all but certain, then, that in either the *Service Employees* case, which is still pending in the district court, or in some similar case, the Ninth Circuit will have an opportunity to consider whether § 501(a) & (b) taken as a whole – as opposed to § 501(b) standing alone – provide labor organizations with a cause of action to remedy breaches of the duties declared in § 501(a). When the Ninth Circuit does revisit this issue, with the benefit of the thorough analysis of the text of § 501 considered as a whole contained in the more recent Seventh Circuit decision below and Eleventh Circuit *Statham* decision, it is equally certain that the Ninth Circuit will reach the same conclusion as those circuits.

Against that background, the asserted conflict between the recent decisions of the Seventh and Eleventh Circuit and the earlier decision of the Ninth Circuit is not one that calls for this Court's intervention at this time.[1]

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[1] The division among the district courts cited by the petition, Pet. 12-13, is of no moment. The district court decisions are not binding precedents, even in the districts in which they were issued. To the extent that the district courts outside the Seventh and Eleventh Circuits continue to find that LMRDA § 501 does not create a cause of action for unions, that occurrence will merely provide the other circuits an opportunity to rule on this issue.

B. The text of LMRDA § 501 manifests Congress's intent to create a cause of action for labor organizations to bring suit against union officers seeking recovery for the "liability for breach of the duties declared by th[at] section." 29 U.S.C. § 501(a). Indeed, the statutory text cannot support any other reading.

(i) Section 501(a) begins by stating generally that "[t]he officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group." 29 U.S.C. § 501(a). The Section then goes on to enumerate "the dut[ies] of each such person, taking into account the special problems and functions of a labor organization" as follows:

> "to hold its money and property solely *for the benefit of the organization and its members* and to manage, invest, and expend the same *in accordance with its constitution and bylaws and any resolutions of the governing bodies* adopted thereunder,
>
> "to refrain from *dealing with such organization* as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest *which conflicts with the interests of such organization*, and
>
> "*to account to the organization* for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction *on behalf of the organization*." *Ibid.* (emphasis added).

And, the Section concludes by providing that "[any] general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of *liability for breach of the*

duties declared by this section shall be void as against public policy." *Ibid.* (emphasis added).

The text of § 501(a) sets out the requisites for a federal breach of duty cause of action on behalf of labor organizations. That provision "declare[s]" a set of duties that a labor organization's officers owe "to such organization and its members as a group." And, that provision – in its non-exculpation clause – takes pains to assure that transgressing union officers are subject to legal "liability for breach of the duties declared by th[at] section." What is more, the provision is contained in Title V of the Act, which provides "Safeguards for Labor Organizations." 29 U.S.C. Subchapter VI. Thus, as the Eleventh Circuit aptly observed, "If Congress had only enacted section 501(a) without section 501(b), no one would suggest that Congress meant to deny the union the right to enforce 501(a)." *Statham*, 97 F.3d at 1420. *See* Pet. App. 19a-21a (analyzing the language of Section 501(a)).

(ii) Against all of the foregoing, the petition says barely a word about the text of § 501(a). *See* Pet. 4. Instead, the petition would infer that § 501 does not create a labor organization cause of action from the fact that § 501(b) creates a limited cause of action allowing union members – where "the labor organization . . . refuse[s] or fail[s] to sue" on its own behalf to "sue [an] officer" who is "alleged to have violated the duties declared in subsection (a)" in order "to recover damages or secure an accounting . . . for the benefit of the labor organization." 29 U.S.C. § 501(b). *See* Pet. 15-18.

Section 501(b) creates no such negative inference. As the Seventh Circuit noted, "[t]he derivative action created in subsection (b) for individual union members reinforces rather than undermines the implica-

tion [that § 501 creates a labor organization cause of action] arising from the text of subsection (a)." Pet. App. 22a.

To begin with, § 501(b) provides that a union member may sue an officer for "violat[ing] the duties declared in subsection (a)" *only* if "the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization." 29 U.S.C. § 501(b). In other words, the precondition to a union member § 501(b) lawsuit is that the "union members have requested that the union seek relief for violations of § 501(a), and the union has failed or refused to take such action." Pet. App. 23a. That requirement can only be read as embodying the premise that § 501(a) has already provided the labor organization with the means "to sue" for violations of the duties declared there to "recover damages or . . . other appropriate relief." For it cannot be that Congress would impose a requirement on union members to request the labor organization to sue a union officer for breach of the § 501(a) duties when Congress has not empowered the organization to bring such a suit.

Beyond that, § 501(b) provides that "[t]he union member's suit may 'recover damages or secure an accounting or other appropriate relief *for the benefit of the labor organization*.'" Pet. App. 23a quoting with emphasis 29 U.S.C. § 501(a). Thus, in § 501(b), "Congress has created a derivative system much like shareholder derivative actions seen in corporate law." *Ibid.* A shareholder derivative action is "a suit to enforce *a corporate cause of action* against officers, directors, and third parties," i.e., a suit to enforce "a valid claim *on which the corporation could have*

sued." Pet. App. 24a quoting with emphasis *Ross v. Bernhard*, 396 U.S. 531, 534 (1970). It follows that the union member derivative suit created by § 501(b) asserts "a [labor organization] cause of action" "on which the [labor organization] could have sued." And, in this context, that labor organization cause of action must be a cause of action for breach of the duties declared by § 501(a).

In sum, "the text and remedial structure of § 501(a) and (b), read together, imply both federal rights and a federal remedy for labor organizations against union officers who violate their statutory duties." Pet. App. 25a. Indeed, the only serious question is whether to call that labor organization breach of duty cause of action express or implied. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 818 n. 11(1994) ("to say that A shall be liable to B is the *express* creation of a right of action").

C. The petition's effort to obfuscate the clear meaning of the statutory text by resort to bits and pieces of the legislative history fails. *See* Pet. 18-25. "The legislative history concerning § [501] plainly supports the conclusion that Congress meant what it said" in that provision. *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 775 (1984).

The reason advanced for including a provision in the LMRDA declaring the fiduciary obligations of union officers was that the state law had proven inadequate in that regard. *See* S. Rep. No. 187, 86th Cong., 1st Sess. 72 (April 14, 1959) (Minority Views), reprinted in NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, vol. 1, p. 468 (1959) ("Leg. Hist.") ("Union officials alone seem to be free from what has become a normal, in fact a universal, obligation of officials simi-

larly situated."). Senator Goldwater, who was a principal proponent of adding a provision on fiduciary duties, elaborated on this point as follows:

> "Of course, today the situation is that virtually all groups, except labor organizations, require fiduciary responsibility on the part of their officials. The minister of the church which my friend, the Senator from North Dakota, attends is required by State law to have fiduciary responsibility – as is true in the case of all other nonprofit organizations. Yet the leaders of labor organizations are not required to have similar fiduciary responsibility.
>
> "Likewise, the president of the Red Cross, the president of the YMCA, and the president of the YWCA are required to have fiduciary responsibility, as spelled out in the State laws which relate to nonprofit organizations. On the other hand, a union leader is not required to have such fiduciary responsibility.
>
> "We propose this amendment only in order to provide some relief in that situation, because I know of no existing law which makes possible the recovery of funds which are improperly taken from a labor organization by one of its leaders. For instance, the vast sums of money which Dave Beck took from his union can never be recovered by law, according to my understanding." 105 Daily Cong. Rec. 5859 (April 23, 1959), 2 Leg. Hist. 1133.

Against that background, it is inconceivable that the LMRDA Congress did not provide labor organizations a federal cause of action against union officers who breach the duties declared in § 501(a) or relegated unions to what Congress regarded as the inadequate state law of union officer fiduciary duty. And, it utterly defies reason to suppose that Congress intended to require, as a precondition to bring-

ing suit under § 501(b), that union members request that their union invoke the inadequate means provided by state law for redressing fiduciary breaches and then bar the members from enforcing the federal duties declared in § 501(a) if the union does invoke the inadequate state remedies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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